

Finau (Migration) [2023] AATA 3915 (15 November 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Palatoni Pladnium Finau
CASE NUMBER:	2316284
HOME AFFAIRS REFERENCE(S):	BCC2023/2633802
MEMBER:	Kira Raif
DATE:	15 November 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl. 820.211(2)(d)(ii) of Schedule 2 to the Regulations • cl. 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations • reg 2.03A •

Statement made on 15 November 2023 at 2:45pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – genuine and continuing relationship – duration of relationship – limited but acceptable evidence of financial, household and social aspects of relationship and nature of commitment – application made more than 28 days after last substantive visa ceased – discretion to waive criterion – sponsor’s and child’s physical health – applicant father figure to sponsor’s child – immigration detention – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65
Migration Regulations 1994 (Cth), r 2.03A, Schedule 2, cls 820.211(2)(a), (d)(ii), 820.221, Schedule 3, item 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

He v MIBP [2017] FCAFC 206

MZYPZ v MIAC [2012] FCA 478

Plaintiff M64/2015 v MIBP [2015] HCA 50

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The visa applicant is a national of Tonga, born in November 1988. He applied for the visa on 2 May 2023 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211 was not met because the applicant did not meet the requirements of Item 3001 of Schedule 3 to the Migration Regulations and the delegate found there were no reasons to waive this requirement. The delegate was also not satisfied the applicant was the de facto spouse of the sponsor. The applicant seeks review of the delegate's decision.
3. The applicant appeared before the Tribunal on 15 November 2023 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's partner. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

4. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
5. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.
6. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
7. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3). Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
8. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
9. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant

satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.

Are the parties in a de facto relationship?

10. The applicant's evidence is that he and the sponsor met on Facebook and he knew that she was separated and they made arrangements to meet in person. They started an intimate relationship straight away and continued seeing each other. In 2019 they had a conversation about living together and moved in together.
11. The Tribunal has considered the financial aspects of the relationship. The applicant's evidence is that he did not formally work (he claims he did odd jobs for the family) and did not have a regular income. The applicant told the Tribunal that he and the sponsor opened a joint account in 2019 where small amounts would be deposited but it was predominantly the sponsor's income that was deposited into the account. When asked why there was a need for a joint account when the applicant had no income, the sponsor explained to the Tribunal that the joint bank account would have helped with the evidence and in the circumstances the Tribunal does not consider that the joint account evidences the sharing of resources.
12. There is limited documentary evidence about the financial aspects of the relationship and no evidence of joint liabilities or joint obligations but the Tribunal acknowledges that the couple's financial circumstances may not have permitted the establishments of such ties.
13. The Tribunal accepts that when the applicant was in the community, he and the sponsor had both contributed to the payment of various household expenses and the Tribunal accepts their evidence that they relied on family members in receiving financial support at times of need. The Tribunal accepts that there was pooling of funds and joint responsibility for expenses.
14. The Tribunal has considered the social aspects of the relationship. The parties' evidence is that they lived with the applicant's mother for about six months and both spoke about the support they received from family members. There is evidence about joint social activities such as church attendance, school attendance, etc. Shortly before the hearing the applicant provided to the Tribunal several statements from third parties attesting to the genuine nature of the relationship, as well as some social photographs of the couple.
15. The Tribunal accepts that the applicant and sponsor plan and undertake joint social activities. The Tribunal accepts that the relationship is recognised by family and friends who believe the relationship to be a genuine one.
16. There is evidence before the Tribunal about the applicant's care for the sponsor's child. The sponsor told the Tribunal that her daughter has been neglected by her father who had abandoned the family. The sponsor spoke about the applicant being a father figure in her daughter's life and the effect of separation on the child. The sponsor told the Tribunal that she loves the applicant and trusts him with her daughter. The Tribunal accepts the evidence that the applicant has been closely involved with the child's upbringing, preparing meals for her, taking her to and from school and supporting her emotionally. The Tribunal accepts that the applicant has taken on the parental responsibilities in relation to his step-daughter.
17. The parties claim to have started living together in 2019. They lived with the applicant's mother for some months before living independently. They spoke about their living arrangements and sharing of housework. The Tribunal accepts that the applicant and sponsor had established a joint household.

18. The relationship had been in existence for approximately five years. The couple spoke about their plans for marriage (which was delayed as both were awaiting their divorce documents) and their longer term plans. They spoke about the support the applicant provides to the sponsor and the child due to their concerns. The Tribunal accepts that the applicant and sponsor view their relationship as a long term one and they rely on each other for comfort and support.
19. Overall, and having regard to all the circumstances, the Tribunal is satisfied that the applicant and the sponsor have a mutual commitment to a shared life as de facto partners to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together or not apart on a permanent basis (noting that the applicant is presently in immigration detention). The Tribunal accepts that these circumstances existed when the application was made and continue to exist at present.
20. The Tribunal finds was the de facto partner of the sponsor when the application was made and at present. The applicant meets cl. 820.211(2)(a) and cl. 820.221.

Are the additional criteria for a de facto relationship met?

21. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
22. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
23. The applicant claims that he and the sponsor first met in July 2018 and that they committed to a relationship in June 2019 (according to the application form) or October 2019 (according to the sponsors' statement). In oral evidence the applicant suggested he and the sponsor had a conversation about their future together by Christmas 2018 or 2019 and they started living together in January 2019. Whatever the correct date is, the Tribunal is satisfied that by late 2019 the applicant and sponsor were living together in a de facto relationship. As the application for the visa was made in 2023, the Tribunal is satisfied the relationship has been in existence for more than 12 months at the time the application was made.
24. The applicant meets the requirements of reg 2.03A

Does the applicant meet Schedule 3 criteria?

25. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that the applicant travelled to Australia holding a Visitor visa on 27 March 2018. That visa ceased on 8 May 2018 and the applicant became an unlawful non-citizen. He made an application for a substantive visa in September 2020 and it was refused in March 2021. The applicant again became an unlawful non-citizen.
26. In his written submissions provided shortly before the hearing the applicant provided a number of documents, including an statement about becoming an unlawful non-citizen.

Essentially the applicant stated that his step-father was a violent person and did not care for his younger siblings so he decided to remain in Australia to take care of his younger siblings.

27. The Tribunal finds, having regard to that information, that the last day the applicant held a substantive visa was when his Visitor visa expired on 8 May 2018. The Tribunal finds that the applicant was not a holder of a substantive visa at the time he made the application for the Partner visa in May 2023. There is nothing to suggest that the applicant entered Australia as a holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder. The Tribunal is not satisfied the applicant meets cl. 820.211(d)(i). The applicant is required to satisfy the Schedule 3 criterion 3001 for the purpose of cl. 820.211(d)(ii).
28. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.
29. The Tribunal has found that the applicant ceased to hold a substantive visa when his Visitor visa expired in May 2018. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3. As his application for the Partner visa was made in May 2023, the Tribunal is not satisfied that the application was validly made within 28 days after the relevant day. The Tribunal is not satisfied that the applicant meets Item 3001.
30. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

Are there compelling reasons for not applying those criteria?

31. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
32. The expression 'compelling reasons' is not defined for these purposes. However, reasons that are compelling should 'force or drive the decision-maker' 'irresistibly' to some end: *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31]. The reasons or circumstances should be sufficiently powerful to lead a decision-maker to find that the criteria should not be applied: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
33. The applicant's evidence to the Tribunal is that his partner has significant health issues (removal of a kidney, diabetes and high blood pressure). The applicant's evidence is that as a result, she is often tired and needs a lot of rest while he takes on domestic responsibilities, drives her to medical appointments and takes care for the child. The Tribunal accepts that evidence.
34. The applicant also spoke about his step-daughter's health issues. The applicant spoke about the care and support he provides to the child, including being responsible for preparing her lunches, taking her to school and picking her up from school. There is a statement from the child's school confirming these arrangements and the Tribunal accepts the applicant's evidence.

35. The sponsor spoke about the close relationship between her daughter and the applicant, stating the child was abandoned by her biological father and treats the applicant as her father. The sponsor talked about her daughter's health issues since the applicant was taken into detention. The Tribunal accepts that evidence.
36. In the particular circumstances of this case, the Tribunal considers the combination of these factors – the long term relationship that has been in existence since 2019, the sponsor's health issues and reliance on the applicant, the applicant's parental responsibilities in relation to his step-daughter and the child's health issues that seem to have been exacerbated by her separation from the applicant – constitute compelling reasons for not applying the schedule 3 criteria.
37. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl 820.211(2)(d)(ii).

Conclusion

38. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

39. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl. 820.211(2)(d)(ii) of Schedule 2 to the Regulations
 - cl. 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations
 - reg 2.03A

Kira Raif
Senior Member

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